

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*INSPECTOR ROBERT JOHN HORTLE v APRINT (AUST) PTY LTD & ANOR* [2007] FMCA 1547

INDUSTRIAL RELATIONS – Application for imposition of penalties – underpayment of employees – agreed facts – consideration of matters relevant to penalty – accessorial liability.

*Workplace Relations Act 1996* (Cth), ss.4, 718, 719 & 728  
*Corporations Act 2001* (Cth), s.499

*CPSU v Telstra Corporation Limited* (2001) 108 IR 228  
*Industry, Tourism and Resources, Minister for v Mobil Oil Australia Pty. Ltd.*  
[2004] ATPR 41-993  
*Kelly v Fitzpatrick* [2007] FCA 1080  
*Ponzio v B&P Caelli Constructions Pty Ltd* [2007] FCAFC 65  
*Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412

Applicant:	INSPECTOR ROBERT JOHN HORTLE
First Respondent:	APRINT (AUST) PTY LTD
Second Respondent:	YU TU CHUAN
File Number:	MLG 1363 of 2006
Judgment of:	O'Sullivan FM
Hearing date:	7 September 2007
Date of Last Submission:	7 September 2007
Delivered at:	Melbourne
Delivered on:	10 September 2007

## **REPRESENTATION**

Counsel for the Applicant: Mr O'Grady  
Solicitors for the Applicant: Blake Dawson Waldron  
Counsel for the First Respondent: No appearance  
Solicitors for the First Respondent: No appearance  
Counsel for the Second Respondent: Mr Niall  
Solicitors for the Second Respondent: Charles Chow

## **ORDERS**

- (1) The Court orders that the following penalties be imposed on the Second Respondent:
  - (a) \$3,120.00 for failing to pay the Employees at the correct rate for the ordinary hours worked each week during the period of their employment after 27 March 2006;
  - (b) \$3,120.00 for failing to pay the Employees overtime at the rate prescribed for the overtime worked each week during the period of their employment after 27 March 2006;
  - (c) 1,500.00 for failing to employ Harry, Nick and Jack for ordinary hours which did not exceed an average of 38 hours per week during the period of their employment after 27 March 2006; and
  - (d) \$1,500.00 for failing to pay Harry, Nick and Jack by cash, cheque or electronic funds transfer after 27 March 2006.
- (2) The penalties within Order 1 be payable within 60 days.
- (3) The proceedings as against the first respondent be adjourned to 16 November 2007.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
MELBOURNE**

**MLG1363 of 2006**

**INSPECTOR ROBERT JOHN HORTLE**

Applicant

And

**APRINT (AUST) PTY LTD**

First Respondent

And

**YU TU CHUAN**

Second Respondent

**REASONS FOR JUDGMENT**

1. This matter concerns an application filed on 27 October 2006 for the imposition of penalties pursuant to s.719 of the *Workplace Relations Act 1996* (Cth) (“the Act”).
2. The application is brought by, Mr. Robert John Hortle, an inspector who has standing pursuant to s.718 of the Act.
3. The first respondent is a constitutional corporation within the meaning of s.4 of the Act.
4. On 10 July 2007 at a meeting of creditors of the first respondent Peter Gountzos and Richard Gauci of CJL Partners were appointed as joint and several liquidators of the first respondent in accordance with s.499 of the *Corporations Act 2001* (Cth).

5. The second respondent Mr Yu Tu Chuan is a natural person who was at all relevant times a director of the first respondent.
6. By an amended application, filed on 30 April 2007, the applicant seeks declarations and penalties against the first and second respondents in relation to their treatment of the former employees of the first respondent namely, “Jack”, “Harry”, “Nick” and “Frank” (“the employees”).
7. In summary, the declarations and penalties sought by the applicant concern alleged underpayment of wages, underpayment of overtime, failures to employ the employees for ordinary hours which did not exceed an average of 38 hours per week and failure to pay wages in cash by both the first and second respondents.
8. Given the appointment of liquidators to the first respondent and the operation of the relevant provisions of the *Corporations Act 2001* (Cth) and having satisfied the Court the first respondent was on notice, the applicant sought leave to proceed against the second respondent and to adjourn the matter as against the first respondent to further directions.
9. The relevant declarations and penalties sought as against the second respondent were at paragraphs 23-26 of the amended application filed 30 April 2007 and were as follows:

*“23. A declaration that, during the period from 27 March 2006 to 5 September 2006 , the second Respondent, by reason of the operation of s. 728 of the WR Act, breached clause 2 of the Declaration and clause 6.1.1 of the Award by failing to employ each of Jack, Harry and Nick for ordinary hours which did not exceed an average of 38 hours per week as declared in the orders in paragraphs 19 to 21 above.*

*23A. A deceleration that, during the period from 27 March 2007 to 5 September 2006, the second Respondent, by reason of the operation of s. 728 of the WR Act breached clause 2 of the Deceleration and clauses 6.4.2 and 6.4.3 of the Award by underpaying each of Jack, Harry Nick and Harry for overtime which he worked as declared in the orders in paragraphs 10 to 13 above.*

- 23B. *A deceleration that, during the period from 27 March 2006 to 5 September 2006, the second Respondent, by reason of the operation of s. 728 of the WR Act, breached clause 2 of the Declaration and clause 5.3.3 of the Award by failing to pay each of Jack, Harry, and Nick in cash or electronic transfer as declared in the orders in paragraphs 15 to 17 above.*
24. *The imposition on the second Respondent of a penalty or penalties under s.178(1) of the Pre-reform Act, alternately s.719(1) of the WR Act of each breach of clause 2 of the Declaration and clauses 5.1.1, 5.3.3, 6.1.1, 6.4.2 and 6.4.3 of the Award referred to in the orders in paragraphs 10 to 13 and 15 to 17 and 19 to 21 above, in so far as each such breach occurred or continued to occur during the period on and from 27 March 2006.*
25. *A declaration that the second Respondent by reason of the operation of s.728 of the WR Act, has breached s.182 of the WR Act being a term of the Standard by underpaying:*
- (a) Jack, for the period 27 March 2006 to 30 August 2006;*
  - (b) Harry, for the period 27 March 2008 to 3 September 2006;*
  - (c) Nick, for the period 27 March 2006 to 20 August 2006;*
  - (d) Frank, for the period 26 August 2006 to 8 September 2006.*
26. *The imposition in the Second Respondent of a penalty or penalties under s. 719(1) of the WR Act for each breach of the Standard referred to in order 4 to 7 above.*

## **Background**

10. The matter proceeded as against the second respondent on the basis of an agreed statement of facts which was filed with the Court on 7 August 2007. That statement of agreed facts (SAF) is attached to this judgement at “Appendix A”.

11. I accept that the background to these proceedings is accurately set out paragraphs 8 through to 51 of the “SAF” which I incorporate into these reasons for judgement.

**“AGREED FACTS**

***Background***

8. *The Applicant:*

- (a) *was, prior to 27 March 2006, an inspector appointed under s.84 of the Pre-reform Act;*
- (b) *is, and has since 27 March 2006 been, by reason of item 13(1) of schedule 4 to the Work Choices Act, an inspector under s.167(2) of the WR Act; and*
- (c) *entitled to bring this proceeding under s.178(1) of the Pre-reform Act, pursuant to regulation 2.19 of Chapter 7 of the Workplace Relations Regulations 2006 (Cth), and under s.719(1) of the WR Act, pursuant to s.718 of the WR Act.*

9. *APrint:*

- (a) *is a body corporate under the Corporations Act 2001 (Cth);*
- (b) *is capable of being sued in its corporate name;*
- (c) *is a person and an employer for the purposes of s.178 of the Pre-reform Act;*
- (d) *is a person for the purposes of s.719 of the WR Act;*
- (e) *is, and has since 27 March 2006 been, an employer for the purposes of s.6 of the WR Act;*
- (f) *at all relevant times operated the Business;*
- (g) *is, and has since 1 January 2005 been, bound by the Declaration;*

*by reason of it being so bound, is and has since 1 January 2005 been bound by the Award, subject*

*to certain exclusions provided for in the Declaration; and*

*(h) at all relevant times employed each of the Employees.*

*10. Mr. Tu was at all material times:*

*(a) a director of Aprint;*

*(b) majority shareholder of Aprint; and*

*(c) the manager of the Business.*

*11. The Declaration:*

*(a) was made by the Australian Industrial Relations Commission on 6 December 2004 (Print PR953999);*

*(b) provides amongst other things that, subject to the matters referred to in clauses 4 to 7 of the Declaration and the exclusions provided for in clause 3 of the Declaration, the Award applies as a common rule for the industry (as defined in clause 1.4) in Victoria (subject to the geographical restrictions in clause 2.1) and is binding on all employers in respect of the employment by them of employees (see clauses 2.1 and 2.2);*

*(c) has, by reason of clause 4 of the Declaration, operated since 1 January 2005;*

*(d) was, up to 26 March 2006, an award for the purposes of s.4 of the Pre-reform Act;*

*(e) is an award for the purposes of item 4 of schedule 4 to the Work Choices Act;*

*(f) is an original award for the purposes of item 4 of schedule 4 to the Work Choices Act;*

*(g) by reason of the operation of sub-item 4(3) of schedule 4 to the Work Choices Act, has since 27 March 2006, taken effect as a pre-reform award;*

*(h) was by its terms binding upon APrint from 1 January 2005 to 26 March 2006;*

- (i) *is, and has since 27 March 2006 been, binding on APrint by reason of the operation of sub-items 4(3), (4) and (5) of schedule 4 to the Work Choices Act;*
- (j) *is a pre-reform federal wage instrument for the purposes of s.178 of the WR Act; and*
- (k) *is a pre-reform wage instrument for the purposes of s.178 of the WR Act.*

12. *The Award:*

- (a) *was made by the Australian Industrial Relations Commission on 8 December 1999 (Print AW782505) and has since been varied;*
- (b) *was, up to 26 March 2006, an award for the purposes of s.4 of the Pre-reform Act;*
- (c) *is an award for the purposes of item 4 of schedule 4 to the Work Choices Act;*
- (d) *is an original award for the purposes of item 4 of schedule 4 to the Work Choices Act;*
- (e) *by reason of the operation of sub-item 4(3) of schedule 4 to the Work Choices Act, has since 27 March 2006 taken effect as a pre-reform award;*
- (f) *was by its terms binding on APrint from 1 January 2005 to 26 March 2006;*
- (g) *is, and has since 27 March 2006 been, binding upon APrint by reason of the operation of sub-items 4(3), (4) and (5) of schedule 4 to the Work Choices Act;*
- (h) *is a pre-reform federal wage instrument for the purposes of s.178 of the WR Act;*
- (i) *is a pre-reform wage instrument for the purposes of s.178 of the WR Act; and*
- (j) *contains rates provisions (clause 5.1) for the purposes of s.180 and s.181 of the WR Act.*

***Employment of the Employees***

13. *In 2005, on behalf of Aprint, Mr. Tu travelled to China to recruit additional employees to work as Printers for the Business. In consequence of this visit, a decision was made by Aprint to offer the Employees employment with Aprint. Aprint paid for and was responsible for all expenses in relation to the trip.*
14. *Aprint obtained candidates for employment through a central employment agency owned or operated by the Government of the Peoples Republic of China. At all material times the Employees were able and did obtain the assistance from the Chinese Employment agency in relation to working in Australia.*
15. *Aprint retained a migration agent in Australia in order to assist it in complying with Australian Migration laws.*
16. *On or about 22 June 2005 Aprint applied for approval as a business sponsor under the Migration Act.*
17. *In or about June 2005, Aprint applied under the Migration Act to nominate each of the Employees for the purpose of the grant to the Employees of a business visa subclass 457.*
18. *Each of the Employees applied for a subclass 457 visa. In each application the Employee disclosed:*
  - a) *The amount of annual salary that he would be paid; and*
  - b) *Attached a translation of the contract that detailed the number of hours that the Employee would work each week (50) and that amounts would be deducted to pay for rent and other expenses.*
19. *Each of the Employees accepted offers of employment with Aprint, after signing written contracts of employment in China, and subsequently entered Australia on subclass 457 visas sponsored by Aprint. Neither Mr. Tu nor the Employees speak English as a first language and communication between them was done in the Chinese language. Their contracts were prepared in Chinese*

20. *There were terms of each written contract of employment that:*

- a) the employment was for four years;*
- b) the Employee would work for five days, rest two days, work each day for 10 hours, with a weekly amount of 50 hours;*
- c) the Employee is entitled to two weeks of paid annual leave;*
- d) based on operational requirements, when the Employee works overtime, he will be paid a rate of \$18.00, or receive the corresponding time as annual leave in lieu;*
- e) in the first year of employment, Aprint would deduct monthly instalments from wages over the course of one year totalling \$10,000 to cover various processing fees such as the cost of the visa application for the Employee to come to Australia, and legal representation (note that there is a footnote made by the translator that the word used in Chinese which was interpreted to mean “deduct” is closer to “keep” or “save” rather than “deduct”);*
- f) in the first two years Aprint would assist the Employee to arrange convenient and suitable accommodation, but commencing the third year, the Employee would arrange their own accommodation; and*
- g) to ensure the convenience of work and life, in the first two years of employment, in principle, the Employee could not bring along their family members.*

21. *The Employees commenced employment with Aprint on or about 5 September 2005, with the exception of Frank, who commenced employment on or about 26 August 2006. They were employed in accordance with the terms of the contract of employment entered into between them.*

22. *In or about September 2006, each of the Employees resigned from their employment with Aprint with the exception of Jack who remained in employment.*
23. *During their employment with Aprint, the Employees were offered accommodation in Lynch Street, Hawthorn in close proximity to the Business in premises owned by Mr. Tu. However, prior to moving into this accommodation, Harry and Nick were accommodated at the Business for a number of weeks. The Employees were required to move out of the property at Lynch Street in or about October 2006, when it was put on the market.*
24. *Aprint deducted from the each of the Employees pay in the amount of \$120 per week for use of the accommodation and, from time to time, for additional monies to be deducted in connection with the accommodation, such as utilities.*
25. *At all relevant times, the minimum rates of pay prescribed by clause 5.1.1 of the Award were as follows:*
  - a) *for an employee classified as a level 1 employee - \$484.40 per week, or \$12.75 per hour;*
  - b) *for an employee classified as a level 2 employee - \$501.10 per week, or \$13.19 per hour; and*
  - c) *for an employee classified as a level 5 employee - \$578.20 per week, or \$15.22 per hour.*
26. *Clause 5.3.3 of the Award provides that wages are to be paid in cash, cheque or electronic transfer.*
27. *Clause 6.1.1(b)(i) of the Award provides that an employer must employ employees for ordinary hours which do not exceed an average of 38 hours per week.*
28. *Clause 6.1.1(d) of the Award provides that all ordinary hours worked on a weekend are to be paid at the rate of double time.*

29. *Clause 6.4.2 of the Award provides that all overtime earnings are to be paid at the rate of time and one half for the first three hours and double time thereafter, subject to clause 6.4.3 of the Award which provides that all overtime worked on a weekend should be paid at the rate of double time.*
30. *By the operation of s.208 of the WR Act, with effect from 27 March 2006, clause 5.1.1 of the Award was:*
- a) taken to be a preserved APCS for the purposes of s.178 of the WR Act; and*
  - b) consequently an APCS for the purposes of s.178 and s.182 of the WR Act and a term of the AFPCS for the purposes of s.171 and s.718 of the WR Act.*
31. *As a result, with effect from 27 March 2006, s.182 of the WR Act requires employers to pay the employees the rate prescribed by clause 5.1.1 of the Award, alternatively the preserved APCS, for ordinary hours of work as described in clause 6.1.1 of the Award.*

**Harry**

32. *Harry:*
- a) was employed in the Business during the period between 5 September 2005 and 3 September 2006 as a qualified Printer, and independently operated a 6 colour Heidelberg 74 printer and assisted on a 4 colour Heidelberg 52 printer; and*
  - b) performed the duties of a Level 5 employee (for the purposes of clause 5.1.1 of the Award) during his employment.*
33. *During his employment:*
- a) Harry's ordinary hours of work averaged 50 hours per week, alternatively in excess of 50 hours per week;*
  - b) Harry worked the hours identified in the column headed "Ordinary Hours" in each weekly table in Schedule "Harry 1" to the statement of claim;*

- c) *Harry worked the additional hours identified in the column headed "Overtime" in each weekly table in Schedule "Harry 1" to the statement of claim;*
- d) *Harry was paid the amounts identified next to the "Received" entry in each weekly table in Schedule "Harry 1" to the statement of claim;*
- e) *Harry was entitled to receive the amounts identified in the column headed "Entitlement" in each weekly table in Schedule "Harry 1" to the statement of claim;*
- f) *Harry was underpaid the amounts identified next to the "U/P" entry in each weekly table in Schedule "Harry 1" to the statement of claim.*

34. *Aprint failed to:*

- a) *pay Harry at the rate prescribed in clause 5.1.1 of the Award for the ordinary hours worked each week during the period of Harry's employment between 5 September 2005 and 26 March 2006;*
- b) *pay Harry at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of his employment between 27 March 2006 and 3 September 2006;*
- c) *to pay Harry overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of his employment;*
- d) *employ Harry for ordinary hours which did not exceed an average of 38 hours per week during the period of his employment as required by clause 6.1.1(b)(i) of the Award.*

35. *During the period of Harry's employment between 5 September 2005 and 3 September 2006, Aprint deducted the amounts identified in schedule "Harry 2" to the statement of claim, from Harry's weekly pay.*

36. *As a result Aprint failed to pay Harry by cash, cheque or electronic funds transfer as required by clause 5.3.3 of the Award.*

**Nick**

37. *Nick:*

- a) *was employed in the Business during the period between 5 September 2005 and 20 August 2006 as a qualified Printer, and independently operated a 4 colour Heidelberg 52 Printer; and*
- b) *performed the duties of a Level 5 employee (for the purposes of clause 5.1.1 of the Award) during his employment.*

38. *During his employment:*

- a) *Nick's ordinary hours of work averaged 50 hours per week, alternatively in excess of 50 hours per week;*
- b) *Nick worked the hours identified in the column headed "Ordinary Hours" in each weekly table in Schedule "Nick 1" to the statement of claim;*
- c) *Nick worked the additional hours identified in the column headed "Overtime" in each weekly table in Schedule "Nick 1" to the statement of claim;*
- d) *Nick was paid the amounts identified next to the "Received" entry in each weekly table in Schedule "Nick 1" to the statement of claim;*
- e) *Nick was entitled to receive the amounts identified in the column headed "Entitlement" in each weekly table in Schedule "Nick 1" to the statement of claim; and*
- f) *Nick was underpaid the amounts identified next to the "U/P" entry in each weekly table in Schedule "Nick 1" to the statement of claim.*

39. *As a result, Aprint failed to:*

- a) *pay Nick at the rate prescribed in clause 5.1.1 of the Award for the ordinary hours worked each week during the period of Nick's employment between 5 September 2005 and 26 March 2006;*
- b) *pay Nick at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the*

*ordinary hours worked each week during the period of his employment between 27 March 2006 and 20 August 2006;*

- c) pay Nick overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of his employment.*
- d) employ Nick for ordinary hours which did not exceed an average of 38 hours per week during the period of his employment as required by clause 6.1.1(b)(i) of the Award.*

*40. During the period of Nick's employment between 5 September 2005 and 20 August 2006, Aprint deducted the amounts identified in schedule "Nick 2" to the statement of claim, from Nick's weekly pay.*

*41. As a result Aprint failed to pay Nick by cash, cheque or electronic funds transfer as required by clause 5.3.3 of the Award.*

**Jack**

*42. Jack:*

- a) was employed in the Business during the period between 5 September 2005 and 20 August 2006 performing a range of duties including cutting paper and preparing ink for other machine operators, folding paper, packing and cleaning; and*
- b) performed the duties of a Level 1 employee (for the purposes of clause 5.1.1 of the Award) during the first week of his employment; and*
- c) for the remainder of his employment performed the duties of a Level 2 employee (for the purposes of clause 5.1.1 of the Award).*

*43. During his employment:*

- a) Jack's ordinary hours of work averaged 50 hours per week, alternatively in excess of 50 hours per week;*
- b) Jack worked the hours identified in the column headed "Ordinary Hours" in each weekly table in Schedule "Jack 1" to the statement of claim;*

- c) *Jack worked the additional hours identified in the column headed “Overtime” in each weekly table in Schedule “Jack 1” to the statement of claim;*
- d) *Jack was paid the amounts identified next to the “Received” entry in each weekly table in Schedule “Jack 1” to the statement of claim;*
- e) *Jack was entitled to receive the amounts identified in the column headed “Entitlement” in each weekly table in Schedule “Jack 1” to the statement of claim; and*
- f) *Jack was underpaid the amounts identified next to the “U/P” entry in each weekly table in Schedule “Jack 1” to the statement of claim.*

44. *As a result, Aprint failed to:*

- a) *pay Jack at the rate prescribed in clause 5.1.1 of the Award for the ordinary hours worked each week during the period of Jack’s employment between 5 September 2005 and 26 March 2006;*
- b) *pay Jack at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of his employment between 27 March 2006 and 20 August 2006;*
- c) *pay Jack overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of his employment;*
- d) *employ Jack for ordinary hours which did not exceed an average of 38 hours per week during the period of his employment as required by clause 6.1.1(b)(i) of the Award.*

45. *During the period of Jack’s employment between 5 September 2005 and 20 August 2006, Aprint deducted the amounts identified in schedule “Jack 2” to the statement of claim, from Jack’s weekly pay.*

46. *As a result Aprint failed to pay Jack by cash, cheque or electronic funds transfer as required by clause 5.3.3 of the Award.*

**Frank**

47. *Frank:*

- a) *was employed in the Business during the period between 26 August 2006 and 8 September 2006 as a qualified Printer and independently operated a 74SM printing machine; and*
- b) *performed the duties of a Level 5 employee (for the purposes of clause 5.1.1 of the Award) during his employment.*

48. *During his employment:*

- a) *Frank worked the hours identified in the column headed "Ordinary Hours" in each weekly table in Schedule "Frank 1" to the statement of claim;*
- b) *Frank worked the additional hours identified in the column headed "Overtime" in each weekly table in Schedule "Frank 1" to the statement of claim;*
- c) *Frank was paid the amounts identified next to the "Received" entry in each weekly table in Schedule "Frank 1" to the statement of claim;*
- d) *Frank was entitled to receive the amounts identified in the column headed "Entitlement" in each weekly table in Schedule "Frank 1" to the statement of claim; and*
- e) *Frank was underpaid the amounts identified next to the "U/P" entry in each weekly table in Schedule "Frank 1" to the statement of claim.*

49. *As a result, Aprint failed to:*

- a) *pay Frank at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of his employment; and*
- b) *pay Frank overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of his employment.*

50. *For the purposes of ss.728(1) and (2)(c) of the WR Act, from 27 March 2006, Mr. Tu was, by act or omission,*

*directly or indirectly, knowingly concerned in the Aprint contraventions referred to in paragraphs 2(b) to (e) above because:*

- a) prior to the Employees commencing their employment with Aprint, he visited China and interviewed each of them concerning the positions available at Aprint;*
- b) on behalf of Aprint, he negotiated the terms and conditions upon which the Employees would be employed by Aprint;*
- c) on behalf of Aprint, he engaged a migration agent in Australia to ensure that each of the Employees obtained the relevant visa to allow them travel to Australia and work for Aprint and on behalf of Aprint, he made proper disclosure of the hours that were to be worked and the salary that would be paid;*
- d) he arranged accommodation for each of the Employees when they arrived in Australia to work for Aprint and for the majority of their employment with Aprint at premises owned by him or an entity associated with him;*
- e) he estimated that the figure of \$10,000 would be payable as a fair measure of the costs of assisting the Employees work in Australia on the basis that \$5000 of the total would be a bond repayable to the Employee on completion of his employment under the visa;*
- f) he determined that a further sum of about \$120.00 per week would be paid by each of the Employees to Aprint by deducting that amount from their weekly pay;*
- g) he told each of the Employees that the reason for that deduction was to pay for for “legal expenses” in connection with their migration to Australia and for the Mr. Tu’s “travelling expenses” while recruiting in China;*
- h) he determined to deduct other sums from time to time from the weekly pay of each of the Employees,*

*telling them that the deductions were for other costs associated with the accommodation;*

- i) he determined the hours and times that each of the Employees worked during their employment with Aprint; and*
- j) he determined how much each of the Employees would be paid for the work that they performed during their employment with Aprint.*

### ***Total Underpayment***

*51. Aprint underpaid the Employees in respect of their entitlements under the Award and AFPCS as follows:*

- a) in the case of Harry, \$30,946.47;*
- b) in the case of Nick, \$31,706.96;*
- c) in the case of Jack, \$30,225.03; and*
- d) in the case of Frank, \$785.20,*

*making a total of \$93,667.66.”*

- 12. There is before the Court by way of evidence affidavits filed by the applicant on 31 August 2007 and the second respondent on 4 September 2007.
- 13. A number of Exhibits were also tendered by both parties. These were referred to in submissions and relied on by the parties in relation to penalty.
- 14. Both the applicant and the second respondent did not spend long in the witness box and their evidence went only to matters relevant to penalty considerations.<sup>1</sup>

### **Admitted breaches**

- 15. As set out above the second respondent admitted each of the alleged breaches. Accordingly, the matter proceeded on the issue of penalty

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<sup>1</sup> Paragraphs 5,6,10, 11 (first sentence), 12 and 13 of the applicant’s affidavit were objected to as going to the operation of the *Migration Act* and *Regulations*, a matter on which the applicant could not give evidence. Paragraphs 9, 14, 15 and 16 were objected to as matters properly the subject of submissions. Paragraph 17 was not pressed.

only. The following breaches were admitted by the second respondent at paragraph 2 in the SAF:

“2. *On the basis of the agreed facts set out below, Mr Tu admits that Aprint contravened:*

(a) *clause 2 of the Declaration and clause 5.1.1 of the Award by failing to pay Harry, Nick and Jack at the rate prescribed in clause 5.1.1 of the Award during the period of their employment between 5 September 2005 and 26 March 2006;*

(b) *s.182 of the WR Act by failing to pay the Employees at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of their employment after 27 March 2006;*

(c) *clause 2 of the Declaration and clauses 6.4.2 and 6.4.3 of the Award by failing to pay the Employees overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of their employment;*

(d) *clause 2 of the Declaration and clause 6.1.1(b)(i) of the Award by failing to employ Harry, Nick and Jack for ordinary hours which did not exceed an average of 38 hours per week during the period of their employment; and*

(e) *clause 5.3.3 of the Award by failing to pay Harry, Nick and Jack by cash, cheque or electronic funds transfer.*

3. *On the basis of the agreed facts set out below, Mr. Tu admits that he was, by act or omission, directly or indirectly, knowingly concerned in each of the contraventions by Aprint.*

4. *Mr. Tu admits that, by reason of the operation of s.728 of the WR Act, he is treated as having contravened:*

(a) *s.182 of the WR Act by failing to pay the Employees at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of their employment after 27 March 2006;*

- (b) *clause 2 of the Declaration and clauses 6.4.2 and 6.4.3 of the Award by failing to pay the Employees overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of their employment after 27 March 2006;*
- (c) *clause 2 of the Declaration and clause 6.1.1(b)(i) of the Award by failing to employ Harry, Nick and Jack for ordinary hours which did not exceed an average of 38 hours per week during the period of their employment after 27 March 2006; and*
- (d) *clause 5.3.3 of the Award by failing to pay Harry, Nick and Jack by cash, cheque or electronic funds transfer after 27 March 2006.”*

## **The WR Act**

16. Section 719(1) of the Act relevantly states:
- (1) *An eligible court may impose a penalty in accordance with this Division on a person if:*
    - (a) *the person is bound by an applicable provision; and*
    - (b) *the person breaches the provision.*
17. *Applicable provision* is defined in s. 717 as follows:
- applicable provision***, in relation to a person, means:
- (a) *a term of one of these that applies to the person:*
    - (i) *an AWA;*
    - (ii) *the Australian Fair Pay and Conditions Standard;*
    - (iii) *an award;*
    - ...
18. Section 728 of the Act provides:
- (1) *A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.*

- (2) *For this purpose, a person is **involved in** a contravention of a civil remedy provision if, and only if, the person:*
- (a) *has aided, abetted, counselled or procured the contravention; or*
  - (b) *has induced the contravention, whether by threats or promises or otherwise; or*
  - (c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
  - (d) *has conspired with others to effect the contravention.*

19. So far as is presently relevant I am satisfied an award as defined in the WR Act includes the pre-reform instruments (common rule declarations and awards) referred to in the SAF.
20. The Court has the power to impose a penalty on the first respondent pursuant to s.719(1) of the Act with respect to each breach of an applicable provision and the second respondent pursuant to section 728. Section .719(2) of the Act requires the Court to consider two or more breaches of an applicable provision that arise out of a “*course of conduct*” to be taken to constitute one single breach of the applicable provision.
21. There was no dispute that the Court (as an eligible Court) had jurisdiction to make the declarations and impose the penalties sought by the applicant.
22. Before turning to a consideration of the appropriate penalty in these proceedings it is appropriate to set out the principles which will guide the Court’s decision on that penalty.

### **Principles on penalty**

23. The applicant submitted that the principles that should guide the Court’s determination in this matter were uncontroversial.

*“3. The applicable principles are uncontroversial.*

Ponzio v B&P Caelli Constructions Pty Ltd [2007] FCAFC 65 (Marshall, Lander and Jessup JJ, 14 May 2007) (“B&P Caelli”)  
Kelly v Fitzpatrick [2007] FCA 1080 (Tracey J, 27 July 2007) at [14]  
Mason v. Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar [2007] FMCA 7 (Mowbray FM, 16 January 2007) at paragraphs [18]-[24] (“Pangaea”)

24. In *Kelly v Fitzpatrick* [2007] FCA 1080 (*Kelly*) Tracey J at 14 said:

*“In Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 Mowbray FM identified “a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty”. Those considerations were derived from a number of decisions of this Court. I gratefully adopt, as potentially relevant and applicable, the various considerations identified by him. They were:*

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*
- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*
- *Whether the party committing the breach had cooperated with the enforcement authorities.*

- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
- *The need for specific and general deterrence.”*

25. The applicant also submitted that in relation to the maximum penalty that could be imposed for the breaches identified at paragraph [15] above that:

- “4. *The maximum penalty to be imposed for a breach of a term of an award by an individual is \$6,600.00 – s.719(4)(a) of the WR Act.*
5. *Each separate obligation found in an award is regarded as a term for the purposes of the imposition of such a penalty.*

***Kelly v Fitzpatrick at [11] citing Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216 at 223***

6. *The Applicant accepts the application of s.719(2) of the WR Act in respect of breaches which arise out of a course of conduct. The contraventions in respect of different employees are to be treated as a single breach. Accordingly, there are 4 contraventions in total, as set out in paragraph 2 above.*

***Kelly v Fitzpatrick at [6] – [8]***

7. *The Applicant accepts that it is appropriate to apply the totality principle as enunciated by Justice Jessup in B&P Caelli. This requires an assessment of the appropriate penalty for each of the contraventions and then an overall consideration of the conduct of the Defendant, to determine whether the penalty in total is appropriate.*

***Kelly v Fitzpatrick at [30]***

8. *Therefore, the maximum penalty is \$26,400.00.*

***The scheme of the WR Act***

9. *The principal objects of the WR Act are set out in s.3. These objects gave emphasis to the importance of minimum standards, including wages, and the enforcement of those standards. This is reflected in the penalties applicable for award breaches.*

**Kelly v Fitzpatrick at [27].**

10. *The role of civil penalty provisions in the current industrial regime was identified by Justice Merkel in **Finance Sector Union v. Commonwealth Bank of Australia (2005) 224 ALR 467 at 487 [72]**, in the following manner:*

*“... It may be that breaches by unions and employers of industrial legislation from time to time have been accepted as part of the give and take of industrial disputation. However, in recent years industrial legislation has increasingly codified and prescribed what is acceptable, and what is unacceptable, industrial conduct. The legislature has, over time, also moved to increase the penalties that may be imposed in respect of unlawful industrial conduct. In my view, any light handed approach that might have been taken in the past to serious, wilful and ongoing breaches of the industrial laws should no longer be applicable. As is apparent from the penalties that I have imposed, I have not accepted that such an approach, which was urged by CBA (which contended that either no penalty or only a nominal penalty was appropriate), is applicable in the present case.”*

26. The parties accepted that these considerations should guide the exercise of the Court’s discretion in the present proceeding.
27. The applicant filed submissions addressing the considerations relevant to a determination of penalty in this matter. Those submissions will be addressed in the context of each of the considerations relevant to penalty to which I will now turn.

**The nature and extent of the conduct**

28. On this issue the applicant contended that:

*“12. The contraventions of the awards involved a failure to afford important entitlements such as:*

- a) ordinary rates of pay;*
- b) overtime penalty rates;*
- c) hours of work;*
- d) method of payment, making deductions.*

13. *The broad ranging nature of the contraventions reveals a disregard for the Defendant's award obligations. There is nothing to suggest that the contraventions would not have continued had they not been brought to the attention of the Applicant."*

### **Circumstances in which the conduct took place**

29. On this consideration the applicant submitted:

*"18. The Aprint contraventions occurred over a 12 month period and were part of a planned strategy on the part of Mr. Tu and Aprint to bring the Employees into Australia and impose conditions upon them which demanded long hours and little in the way of life outside work (SAF 10 to 17).*

*19. The relevant period for the purposes of the assessment of penalty is after the Work Choices Act commenced, from 27 March 2006 to the end of the employment in September 2006.*

*20. The contraventions continued throughout the period of employment of the respective employees."*

30. Counsel for the applicant submitted that the breaches as against the second respondent arose in circumstances where the second respondent was reckless.

### **Nature and extent of loss or damage**

31. The underpayments involved in this matter are serious. The total underpayments amounted to in \$93, 667.66 (SAF at 51)

32. On this consideration the applicant submitted:

*"14. The underpayments are significant (SAF 48).*

*15. The Employees entered Australia under s.457 visas sponsored by Aprint. None of the Employees speak English as a first language. They were entirely reliant upon Mr. Tu and Aprint in relation to their move to Australia and securing accommodation and the like (SAF 10 to 16). They were prevented from bringing their family members (SAF 17(g)).*

16. *The Employees were then called upon to work extraordinarily long hours (SAF 30(b) and (c), 35(b) and (c), 40(b) and (c), 45(b) and (c), and the schedules to the Statement of Claim)."*

33. The issue of whether the employees were vulnerable was a contentious issue at the penalty hearing. Counsel for the second respondent submitted that there was no probative evidence that the employees were particularly vulnerable just because they were 457 visa holders.

34. Nonetheless in my view there is still both the size of the underpayments, the period over which they occurred and that the payments were made after the intervention of the Workplace Ombudsman should be taken into consideration.

### **Similar previous conduct**

35. On this consideration the applicant submitted:

*"22. The Applicant does not allege that any penalty has been imposed upon Mr. Tu for award breaches prior to this proceeding."*

### **Whether the breaches were properly distinct or arose out of the one course of conduct**

36. On this consideration the applicant submitted:

*"23. Each of the matters set out in **paragraph 2 above** [paragraph 2 in SAF] gives rise to a separate and distinct award obligation.*

*24. The award obligations arise from the operation of the Declaration, which required Aprint to comply with the Award.*

*25. The Applicant accepts that the connection between the various breaches is relevant to the penalty to be imposed."*

### **Size of respondents' business**

37. The first respondent is in liquidation and the second respondent, a director of the first respondent, is an individual. The Act distinguishes between the two for the purposes of penalty.

38. On this consideration the applicant submitted:

*“21. The relevant respondent is an individual.”*

39. At the time the Employees were engaged the first respondent, of which the second respondent was a director, employed 20 people, had a turnover of close to \$1,000,000.00 and a wages bill in excess of \$230,000.00.<sup>2</sup>

40. As Tracey J said in *Kelly* at [28]:

*No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly have an expectation that this will occur. When it does not it will, normally be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level.*

### **Whether the breaches were deliberate**

41. On this consideration the applicant submitted:

*“26. There is nothing to suggest that the failure by Aprint to comply with the Declaration and the Award was inadvertent. The matters set out in paragraphs 10 to 17 of the SAF suggest that the conduct was part of a planned strategy to engage the Employees on the terms and conditions set out in the contracts regardless of the Award obligations.”*

42. Whilst in closing submissions the second respondent submitted the breaches were not deliberate, suffice it to say on the basis of the evidence of the second respondent, I am satisfied the arrangements reached with the employees were planned and put in place before they came to Australia.

### **Involvement of senior management**

43. On this consideration the applicant submitted:

*“27. It is apparent that the Aprint contraventions occurred with the knowledge of senior management. Mr. Tu is by reason of s.728, a contravener himself.”*

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<sup>2</sup> Exhibit A3

44. As set out in paragraph [39] above, in the context of business with a turnover of close to a million dollars and a wages bill of \$230,000.00 the monies repaid to the Employees represent 40% of the annual wages bill.
45. The evidence of the second respondent was he travelled to China to engage the employees and told them they would be working 50 hours a week.
46. As set out earlier I am satisfied the second respondent was reckless as to the first respondent's compliance with workplace relations obligations and its undertaking to so comply when sponsoring the Employees. Moreover by reason of section 728 the second respondent is himself a contravener.

### **Contribution**

47. In evidence the second respondent acknowledged he had a responsibility to understand the applicable industrial instruments. In submissions before the Court on his behalf the second respondent acknowledged the breaches were a serious matter.

### **Corrective action**

48. I am satisfied on the basis of the SAF there had been repayment within a matter of weeks, and the second respondent's co-operation expedited the resolution of the matter (SAF at 52-56).
49. To evidence this corrective action the second respondent tendered Exhibit R2 being the payment schedule to the Employees that he had signed on 13 October 2007.

### **Cooperation with the enforcement authorities**

50. On this issue the applicant submitted:

*“28. Aprint co-operated by attending interviews, allowing the Employees to be interviewed and by remedying the*

*underpayments upon having the matter drawn to its attention by the OWS (sic)*<sup>3</sup>.”

51. Paragraphs 49 to 53 of the SAF are relevant to this consideration.
52. The second respondent placed particular emphasis on this consideration in submissions. The second respondent noted that the employees had been repaid what they had either been underpaid or had deducted within a matter of weeks.<sup>4</sup>
53. The second respondent also submitted, whilst acknowledging the provisions of s. 728 of the Act that the obligations in relation to the employees had been imposed on the first respondent and this should be taken into consideration. Moreover, the second respondent submitted that as s. 728 was a new provision this should also be taken into account.
54. The thrust of the submissions made on his behalf was that considerable time and money had been saved for all involved by virtue of the second respondent’s “*early plea*”.
55. Moreover the second respondent submitted that notwithstanding the admissions, had the matter proceeded it was by no means certain that it would be found that the deductions had been made in breach.<sup>5</sup> In response the applicant submitted, correctly in my view that an award breach amounted to a failure to give an employee that which they were entitled to under the award. In this case the second respondent had admitted four breaches.

### **Enforcing compliance with minimum standards**

56. The applicant’s submissions on this issue were:

*“The Defendant refers to the observations of Justice Tracey in Kelly v Fitzpatrick at [27]”*

57. In that decision His Honour said:

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<sup>3</sup> OWS (Office of Workplace Services) is now the Workplace Ombudsman

<sup>4</sup> Exhibit R2

<sup>5</sup> The second respondent referred to *ANZ v FSU* (2001) 111 IR 227 at 336

*“27. One of the principal objects of the Act is the maintenance of a safety net of minimum terms and conditions of employment and effective enforcement of the obligations imposed by Awards and other industrial instruments. To this end the Act makes provision for the investigation of alleged breaches of obligations imposed by industrial instruments and the imposition of penalties where it is established that breaches have occurred. As already noted, those penalties were significantly increased by Parliament in 2004.”*

58. The second respondent deposed that he did not know his obligations under workplace relations laws.<sup>6</sup> This was consistent with his evidence before the Court which was, amongst other things that he relied on the migration agent engaged to obtain visas for the employees.
59. In submissions on his behalf, the second respondent asked the Court to be cognisant of how recent the introduction of common rule awards in Victoria had been and weigh that in considering his compliance with minimum standards.
60. The answer to both those submissions is to be found in the principal objects of the Act which make clear the importance of minimum standards and the enforcement of those standards.<sup>7</sup>

## **Deterrence**

61. On this consideration the applicant submitted:

*“29. In this case, deterrence is of considerable importance.*

*30. In relation to specific deterrence, regard ought be had to the circumstances of the contraventions and the mitigating factors in paragraphs 49 to 53 of the SAF.*

*31. In relation to general deterrence regard ought be had to:*

- a) the matters identified in the Hortle affidavit;*
- b) the importance role which the Declaration and the Award play in setting a minimum safety of terms and conditions of employment in the printing industry;*

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<sup>6</sup> Paragraph 25 of second respondent’s affidavit

<sup>7</sup> section 3(f) WR Act

- c) *the current industrial climate as described by Justice Merkel in Finance Sector Union v. Commonwealth Bank of Australia [2005] FCA 1847, quoted at paragraph 10 above; and*
  - d) *the statutory scheme identified in Kelly v Fitzpatrick at [27].*
32. *The penalty must be imposed at a meaningful level. It must be such that a potentially offending corporation will see the penalty as not worth the prospect of gain.”*
62. Submissions made on behalf of the second respondent took issue with the need for specific deterrence on the basis of the absence of probative evidence that the employees were at a disadvantage.
63. In *Kelly* at 28 Tracey J, referred with approval to the comments of Finkelstein J in *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 at 231 where His Honour said:
- “even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to make the law’s disapproval of the conduct in question, an act as a warning to others not to engage in similar conduct.”*
64. In this case the second respondent was an officer of the first respondent. The second respondent’s evidence was as such an officer he signed a lot of documents he didn’t read and took no steps to satisfy himself that:
- a) the first respondent was complying with its undertaking when sponsoring the employees; or
  - b) the first respondent understood its workplace relations obligations to those employees.
65. Such conduct should attract the disapproval it deserves. This is particularly the case where an employer, as it did here, warrants it will so comply.

## **Additional considerations**

66. In submissions before the Court the second respondent referred to a range of “*conventional considerations*” that would favour leniency when calculating the appropriate penalty. These included:
- a) the Employees were repaid within a matter of weeks;
  - b) the co-operation of the second respondent with the applicant;
  - c) the business concerned was small;
  - d) the responsibility to comply with the relevant industrial instruments was on the first respondent;
  - e) the conduct was not deliberate;
  - f) there was no need for specific deterrence in this matter; and
  - g) the business is now in liquidation which was said to be a “*tragedy*” for those involved.
67. I accept that the second respondent has co-operated, has admitted and remedied the breaches. As a consequence of this I accept that the second respondent has assisted in expediting the resolution of the proceedings. However, like the repayment of the monies owing co-operation by the second respondent doesn’t lessen the need for sanction and deterrence in penalty proceedings. Moreover, as set out earlier I am satisfied the conduct was planned as the evidence of the second respondent was the employees were at least told, when he visited them in China, what hours they would be working.
68. In *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at 41 Federal Magistrate Driver said:
- “It is important that breaches of awards, enterprise agreements and the like be deterred. It is particularly important that deterrence be seen and acknowledged by persons who might otherwise display a cavalier attitude to their obligations.”*
69. The evidence of the second respondent was whilst he told the migration agent that the first respondent would pay the Employees

the minimum salary level referred to in Exhibit A3 he did not say how many hours they would be working.

70. The evidence of the second respondent was he didn't read the obligations imposed by the undertaking given by the first respondent to comply with workplace relations laws contained in the sponsorship declaration. The evidence of the second respondent was he signed a lot of documents he didn't read and he had no idea what steps the first respondent had taken to comply with workplace relations laws.
71. On any assessment of the second respondent's evidence I am satisfied he displayed a cavalier attitude to compliance with workplace relations laws and this is a matter that should properly weigh in the consideration of penalty.
72. Finally, there was the submission made on behalf of the second respondent that the demise of the business which was said to arise as a result of the allegations against the first and second respondent becoming public was a tragedy.<sup>8</sup>
73. In response to this submission the applicant emphasised that the Court in focusing on the detriment to the second respondent should not ignore the seriousness of the breaches as well as the need to fix an appropriate penalty.<sup>9</sup>
74. Properly in my view the submission advanced on behalf of the applicant makes clear that the breaches in this matter are serious and cannot be ignored however regrettable the circumstances may now be for the second respondent and those who were formerly involved with the business of the first respondent.

## **Penalties**

75. As set out earlier both parties agreed that in fixing the appropriate penalties in this matter the Court should have regard to the totality principle.

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<sup>8</sup> Paragraphs 26-27 of second respondents affidavit

<sup>9</sup> see *ACCC v High Adventure Pty Ltd* (2006) ATPR 42-091, 44-564 at 11

76. In *Kelly* at paragraph 30 Tracey J said:

*“30. Another factor which must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought properly to be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see CPSU v Telstra Corporation Limited (2001) 108 IR 228 at 230[7]. The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches: see Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 at 53. See also Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65 at [145] per Jessup J. This approach was recently described, in the criminal context from which the totality principle is derived, as "the orthodox, but not necessarily immutable, practice" adopted by sentencing courts: see Johnson v R (2004) 205 ALR 346 at 356[26] per Gummow, Callinan & Heydon JJ.*

77. In submissions before the Court Counsel for the applicant sought a penalty between \$5,000.00 and \$10,000.00 as appropriate. The parties agreed that a penalty of \$5,000.00 represented 18.9% of the maximum (i.e. \$26,400.00) and \$10,000.00 represented a penalty at 37.8% of the maximum.

78. Counsel for the second respondent submitted that whilst there had been no agreement on penalty between the parties there had been an agreement of the possible range and that range was as articulated in the applicant's submissions before the Court. The applicant did not take issue with this submission.

79. Counsel for the second respondent submitted that unless, having regard to the principles in *Industry, Tourism and Resources, Minister for v Mobil Oil Australia Pty. Ltd.* [2004] ATPR 41-993 (“Mobil Oil”) the Court was of the view this was outside the permissible

range then a penalty in the range sought by the applicant was appropriate.

80. Turning then to consider the issue of the appropriate penalty in this case.
81. In all the circumstances of this matter there is a clear need for a significant penalty to communicate the unacceptability of the type of behaviour engaged in by the second respondent.
82. In coming to a conclusion on the appropriate penalty I have weighed the considerations set out above and am mindful that the breaches continued over many months. I note that throughout the whole of that period the maximum penalty for each breach would in this case have been \$6,600.00.
83. The applicant accepted that for the purposes of the breaches in this matter they arise out of a course of conduct and in respect of the employees are to be treated as a single breach.<sup>10</sup>
84. Given this I accept there are four breaches in this matter and that the maximum aggregate penalty is \$26,400.00.
85. I accept that the second respondent has admitted the breaches and co-operated with the Workplace Ombudsman. Nonetheless those breaches are serious, as was acknowledged by the second respondent, and they go to matters such as the correct rate of pay, overtime and hours of work all matters that are found in the award safety net referred to in the objects of the Act.<sup>11</sup>
86. It is appropriate to impose a high penalty for the breaches involving underpayments given the terms and amounts involved.
87. Having regard to the principles set out above I consider that the appropriate penalty in this matter to be:
  - a) \$3,120.00 for failing to pay the Employees at the correct rate for the ordinary hours worked each week during the period of their employment after 27 March 2006;

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<sup>10</sup> *Kelly* at 11 citing *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223

<sup>11</sup> see section 3(d), (e) WR Act

- b) \$3,120.00 for failing to pay the Employees overtime at the rate prescribed for the overtime worked each week during the period of their employment after 27 March 2006;
  - c) \$1,500.00 for failing to employ Harry, Nick and Jack for ordinary hours which did not exceed an average of 38 hours per week during the period of their employment after 27 March 2006; and
  - d) \$1,500.00 for failing to pay Harry, Nick and Jack by cash, cheque or electronic funds transfer after 27 March 2006.
88. When I check this by the “*orthodox but not necessarily immutable practice*” referred to in *Ponzio v B&P Caelli Constructions Pty Ltd* [2007] FCAFC 65 at 571 or otherwise I am satisfied an aggregate penalty of \$9,240.00 is within the “*permissible range*” (see *Mobil Oil*) and is “*neither manifestly inadequate nor manifestly excessive*” (see *Caelli* at 565).
89. In coming to that conclusion I have weighed the considerations set out above as well as the involvement of the second respondent in the breaches and that the business concerned is in liquidation.
90. I am satisfied this penalty is within the range of penalties that would be imposed and is set at a meaningful level to communicate the unacceptability of the behaviour of the second respondent having regard to the considerations in this matter.
91. Finally, I note but for being bound by the authorities where the penalty is within permissible range a greater penalty than that agreed to by the parties may well have been ordered.

### **Payment of penalties**

92. The applicant did not make submissions seeking that any penalties imposed by the Court be payable to the Commonwealth: see s. 841(a) of the Act.
93. However, in the circumstances I consider that such an order is appropriate and they be payable within 60 days.

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**I certify that the preceding ninety-three (93) paragraphs are a true copy of the reasons for judgment of O'Sullivan FM**

Associate: James Naughton

Date: 10 September 2007

**“APPENDIX A”**

FEDERAL  
MAGISTRATES  
COURT OF  
AUSTRALIA AT  
MELBOURNE

**Statement of  
agreed facts**

• Type or print clearly • Mark boxes where applicable

Court use only	
A	File number MLG 1363/06
B	Filed at Filed on
C	Place of hearing Hearing date Hearing time
	AM PM

In the matter of:

**INSPECTOR ROBERT JOHN HORTLE**

Applicant

AND

**APRINT (AUST) PTY LTD (ACN 107 526 303)**

First Respondent

AND

**YU TU CHUAN**

Second Respondent

**DEFINITIONS**

1. In this statement of agreed facts:
  - a) “AFPCS” means the Australian Fair Pay and Conditions Standard;
  - b) “Aprint” means Aprint (Aust) Pty Ltd (ACN 107 526 303), the First Respondent in this proceeding;
  - c) “Aprint contraventions” means the contraventions in **paragraph 2** below;

- d) “Award” means the Graphic Arts – General Award 2000;
- e) “Business” means the printing business operated by Aprint from premises in Burwood Road Hawthorn, Victoria;
- f) “Declaration” means the Graphic Arts – General – Victorian Common Rule Declaration 2005;
- g) “Employees” means the following people:
  - i) Mr. Qi Hui Hui (“**Harry**”);
  - ii) Mr. Nie Jian Feng (“**Nick**”);
  - iii) Mr. Hua Chuan Zhang (“**Jack**”); and
  - iv) Mr. Yang Li Dong (“**Frank**”);
- h) “OWS” means the Office of Workplace Services;
- i) “Pre-reform Act” means the WR Act as it was prior to amendment by the Work Choices Act;
- j) “Mr. Tu” means the Second Respondent in this proceeding, Mr. Yu Tu Chuan
- k) “Work Choices Act” means the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth);
- l) “WR Act” means the *Workplace Relations Act 1996* (Cth);

## **ADMITTED CONTRAVENTIONS**

1. On the basis of the agreed facts set out below, Mr Tu admits that Aprint contravened:
  - (a) clause 2 of the Declaration and clause 5.1.1 of the Award by failing to pay Harry, Nick and Jack at the rate prescribed in clause 5.1.1 of the Award during the period of their employment between 5 September 2005 and 26 March 2006;

- (b) s.182 of the WR Act by failing to pay the Employees at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of their employment after 27 March 2006;
  - (c) clause 2 of the Declaration and clauses 6.4.2 and 6.4.3 of the Award by failing to pay the Employees overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of their employment;
  - (d) clause 2 of the Declaration and clause 6.1.1(b)(i) of the Award by failing to employ Harry, Nick and Jack for ordinary hours which did not exceed an average of 38 hours per week during the period of their employment; and
  - (e) clause 5.3.3 of the Award by failing to pay Harry, Nick and Jack by cash, cheque or electronic funds transfer.
2. On the basis of the agreed facts set out below, Mr. Tu admits that he was, by act or omission, directly or indirectly, knowingly concerned in each of the contraventions by Aprint.
3. Mr. Tu admits that, by reason of the operation of s.728 of the WR Act, he is treated as having contravened:
- (a) s.182 of the WR Act by failing to pay the Employees at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of their employment after 27 March 2006;
  - (b) clause 2 of the Declaration and clauses 6.4.2 and 6.4.3 of the Award by failing to pay the Employees overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of their employment after 27 March 2006;
  - (c) clause 2 of the Declaration and clause 6.1.1(b)(i) of the Award by failing to employ Harry, Nick and Jack for ordinary hours which did not exceed an average of 38 hours per week during the period of their employment after 27 March 2006; and

- (d) clause 5.3.3 of the Award by failing to pay Harry, Nick and Jack by cash, cheque or electronic funds transfer after 27 March 2006.

## **AGREED FACTS**

### **Background**

- 4. The Applicant:
  - (a) was, prior to 27 March 2006, an inspector appointed under s.84 of the Pre-reform Act;
  - (b) is, and has since 27 March 2006 been, by reason of item 13(1) of schedule 4 to the Work Choices Act, an inspector under s.167(2) of the WR Act; and
  - (c) entitled to bring this proceeding under s.178(1) of the Pre-reform Act, pursuant to regulation 2.19 of Chapter 7 of the Workplace Relations Regulations 2006 (Cth), and under s.719(1) of the WR Act, pursuant to s.718 of the WR Act.
  
- 5. APrint:
  - (a) is a body corporate under the Corporations Act 2001 (C'th);
  - (b) is capable of being sued in its corporate name;
  - (c) is a person and an employer for the purposes of s.178 of the Pre-reform Act;
  - (d) is a person for the purposes of s.719 of the WR Act;
  - (e) is, and has since 27 March 2006 been, an employer for the purposes of s.6 of the WR Act;
  - (f) at all relevant times operated the Business;
  - (g) is, and has since 1 January 2005 been, bound by the Declaration;

- (h) by reason of it being so bound, is and has since 1 January 2005 been bound by the Award, subject to certain exclusions provided for in the Declaration; and
  - (i) at all relevant times employed each of the Employees.
- 6. Mr. Tu was at all material times:
  - (a) a director of Aprint;
  - (b) a majority shareholder of Aprint; and
  - (c) the manager of the Business.
- 7. The Declaration:
  - (a) was made by the Australian Industrial Relations Commission on 6 December 2004 (Print PR953999);
  - (b) provides amongst other things that, subject to the matters referred to in clauses 4 to 7 of the Declaration and the exclusions provided for in clause 3 of the Declaration, the Award applies as a common rule for the industry (as defined in clause 1.4) in Victoria (subject to the geographical restrictions in clause 2.1) and is binding on all employers in respect of the employment by them of employees (see clauses 2.1 and 2.2);
  - (c) has, by reason of clause 4 of the Declaration, operated since 1 January 2005;
  - (d) was, up to 26 March 2006, an award for the purposes of s.4 of the Pre-reform Act;
  - (e) is an award for the purposes of item 4 of schedule 4 to the Work Choices Act;
  - (f) is an original award for the purposes of item 4 of schedule 4 to the Work Choices Act;
  - (g) by reason of the operation of sub-item 4(3) of schedule 4 to the Work Choices Act, has since 27 March 2006, taken effect as a pre-reform award;

- (h) was by its terms binding upon APrint from 1 January 2005 to 26 March 2006;
- (i) is, and has since 27 March 2006 been, binding on APrint by reason of the operation of sub-items 4(3), (4) and (5) of schedule 4 to the Work Choices Act;
- (j) is a pre-reform federal wage instrument for the purposes of s.178 of the WR Act; and
- (k) is a pre-reform wage instrument for the purposes of s.178 of the WR Act.

8. The Award:

- (a) was made by the Australian Industrial Relations Commission on 8 December 1999 (Print AW782505) and has since been varied;
- (b) was, up to 26 March 2006, an award for the purposes of s.4 of the Pre-reform Act;
- (c) is an award for the purposes of item 4 of schedule 4 to the Work Choices Act;
- (d) is an original award for the purposes of item 4 of schedule 4 to the Work Choices Act;
- (e) by reason of the operation of sub-item 4(3) of schedule 4 to the Work Choices Act, has since 27 March 2006 taken effect as a pre-reform award;
- (f) was by its terms binding on APrint from 1 January 2005 to 26 March 2006;
- (g) is, and has since 27 March 2006 been, binding upon APrint by reason of the operation of sub-items 4(3), (4) and (5) of schedule 4 to the Work Choices Act;
- (h) is a pre-reform federal wage instrument for the purposes of s.178 of the WR Act;
- (i) is a pre-reform wage instrument for the purposes of s.178 of the WR Act; and

- (j) contains rates provisions (clause 5.1) for the purposes of s.180 and s.181 of the WR Act.

### **Employment of the Employees**

9. In 2005, on behalf of Aprint, Mr. Tu travelled to China to recruit additional employees to work as Printers for the Business. In consequence of this visit, a decision was made by Aprint to offer the Employees employment with Aprint. Aprint paid for and was responsible for all expenses in relation to the trip.
10. Aprint obtained candidates for employment through a central employment agency owned or operated by the Government of the Peoples Republic of China. At all material times the Employees were able and did obtain the assistance from the Chinese Employment agency in relation to working in Australia.
11. Aprint retained a migration agent in Australia in order to assist it in complying with Australian Migration laws.
12. On or about 22 June 2005 Aprint applied for approval as a business sponsor under the Migration Act.
13. In or about June 2005, Aprint applied under the Migration Act to nominate each of the Employees for the purpose of the grant to the Employees of a business visa subclass 457.
14. Each of the Employees applied for a subclass 457 visa. In each application the Employee disclosed:
  - (a) The amount of annual salary that he would be paid; and
  - (b) Attached a translation of the contract that detailed the number of hours that the Employee would work each week (50) and that amounts would be deducted to pay for rent and other expenses.
15. Each of the Employees accepted offers of employment with Aprint, after signing written contracts of employment in China, and subsequently entered Australia on subclass 457 visas sponsored by Aprint. Neither Mr. Tu nor the Employees speak English as a first

language and communication between them was done in the Chinese language. Their contracts were prepared in Chinese

16. There were terms of each written contract of employment that:
  - (a) the employment was for four years;
  - (b) the Employee would work for five days, rest two days, work each day for 10 hours, with a weekly amount of 50 hours;
  - (c) the Employee is entitled to two weeks of paid annual leave;
  - (d) based on operational requirements, when the Employee works overtime, he will be paid a rate of \$18.00, or receive the corresponding time as annual leave in lieu;
  - (e) in the first year of employment, Aprint would deduct monthly instalments from wages over the course of one year totalling \$10,000 to cover various processing fees such as the cost of the visa application for the Employee to come to Australia, and legal representation (note that there is a footnote made by the translator that the word used in Chinese which was interpreted to mean “deduct” is closer to “keep” or “save” rather than “deduct”);
  - (f) in the first two years Aprint would assist the Employee to arrange convenient and suitable accommodation, but commencing the third year, the Employee would arrange their own accommodation; and
  - (g) to ensure the convenience of work and life, in the first two years of employment, in principle, the Employee could not bring along their family members.
17. The Employees commenced employment with Aprint on or about 5 September 2005, with the exception of Frank, who commenced employment on or about 26 August 2006. They were employed in accordance with the terms of the contract of employment entered into between them.
18. In or about September 2006, each of the Employees resigned from their employment with Aprint with the exception of Jack who remained in employment.

19. During their employment with Aprint, the Employees were offered accommodation in Lynch Street, Hawthorn in close proximity to the Business in premises owned by Mr. Tu. However, prior to moving into this accommodation, Harry and Nick were accommodated at the Business for a number of weeks. The Employees were required to move out of the property at Lynch Street in or about October 2006, when it was put on the market.
20. Aprint deducted from the each of the Employees pay in the amount of \$120 per week for use of the accommodation and, from time to time, for additional monies to be deducted in connection with the accommodation, such as utilities.
21. At all relevant times, the minimum rates of pay prescribed by clause 5.1.1 of the Award were as follows:
  - (a) for an employee classified as a level 1 employee - \$484.40 per week, or \$12.75 per hour;
  - (b) for an employee classified as a level 2 employee - \$501.10 per week, or \$13.19 per hour; and
  - (c) for an employee classified as a level 5 employee - \$578.20 per week, or \$15.22 per hour.
22. Clause 5.3.3 of the Award provides that wages are to be paid in cash, cheque or electronic transfer.
23. Clause 6.1.1(b)(i) of the Award provides that an employer must employ employees for ordinary hours which do not exceed an average of 38 hours per week.
24. Clause 6.1.1(d) of the Award provides that all ordinary hours worked on a weekend are to be paid at the rate of double time.
25. Clause 6.4.2 of the Award provides that all overtime earnings are to be paid at the rate of time and one half for the first three hours and double time thereafter, subject to clause 6.4.3 of the Award which provides that all overtime worked on a weekend should be paid at the rate of double time.

26. By the operation of s.208 of the WR Act, with effect from 27 March 2006, clause 5.1.1 of the Award was:
- (a) taken to be a preserved APCS for the purposes of s.178 of the WR Act; and
  - (b) consequently an APCS for the purposes of s.178 and s.182 of the WR Act and a term of the AFPCS for the purposes of s.171 and s.718 of the WR Act.
27. As a result, with effect from 27 March 2006, s.182 of the WR Act requires employers to pay the employees the rate prescribed by clause 5.1.1 of the Award, alternatively the preserved APCS, for ordinary hours of work as described in clause 6.1.1 of the Award.

### **Harry**

28. Harry:
- (a) was employed in the Business during the period between 5 September 2005 and 3 September 2006 as a qualified Printer, and independently operated a 6 colour Heidelberg 74 printer and assisted on a 4 colour Heidelberg 52 printer; and
  - (b) performed the duties of a Level 5 employee (for the purposes of clause 5.1.1 of the Award) during his employment.
29. During his employment:
- (a) Harry's ordinary hours of work averaged 50 hours per week, alternatively in excess of 50 hours per week;
  - (b) Harry worked the hours identified in the column headed "Ordinary Hours" in each weekly table in Schedule "Harry 1" to the statement of claim;
  - (c) Harry worked the additional hours identified in the column headed "Overtime" in each weekly table in Schedule "Harry 1" to the statement of claim;

- (d) Harry was paid the amounts identified next to the “Received” entry in each weekly table in Schedule “Harry 1” to the statement of claim;
- (e) Harry was entitled to receive the amounts identified in the column headed “Entitlement” in each weekly table in Schedule “Harry 1” to the statement of claim;
- (f) Harry was underpaid the amounts identified next to the “U/P” entry in each weekly table in Schedule “Harry 1” to the statement of claim.

30. Aprint failed to:

- (a) pay Harry at the rate prescribed in clause 5.1.1 of the Award for the ordinary hours worked each week during the period of Harry’s employment between 5 September 2005 and 26 March 2006;
- (b) pay Harry at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of his employment between 27 March 2006 and 3 September 2006;
- (c) to pay Harry overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of his employment;
- (d) employ Harry for ordinary hours which did not exceed an average of 38 hours per week during the period of his employment as required by clause 6.1.1(b)(i) of the Award.

31. During the period of Harry’s employment between 5 September 2005 and 3 September 2006, Aprint deducted the amounts identified in schedule “Harry 2” to the statement of claim, from Harry’s weekly pay.

32. As a result Aprint failed to pay Harry by cash, cheque or electronic funds transfer as required by clause 5.3.3 of the Award.

**Nick**

33. Nick:

- (a) was employed in the Business during the period between 5 September 2005 and 20 August 2006 as a qualified Printer, and independently operated a 4 colour Heidelberg 52 Printer; and
- (b) performed the duties of a Level 5 employee (for the purposes of clause 5.1.1 of the Award) during his employment.

34. During his employment:

- (a) Nick's ordinary hours of work averaged 50 hours per week, alternatively in excess of 50 hours per week;
- (b) Nick worked the hours identified in the column headed "Ordinary Hours" in each weekly table in Schedule "Nick 1" to the statement of claim;
- (c) Nick worked the additional hours identified in the column headed "Overtime" in each weekly table in Schedule "Nick 1" to the statement of claim;
- (d) Nick was paid the amounts identified next to the "Received" entry in each weekly table in Schedule "Nick 1" to the statement of claim;
- (e) Nick was entitled to receive the amounts identified in the column headed "Entitlement" in each weekly table in Schedule "Nick 1" to the statement of claim; and
- (f) Nick was underpaid the amounts identified next to the "U/P" entry in each weekly table in Schedule "Nick 1" to the statement of claim.

35. As a result, Aprint failed to:

- (a) pay Nick at the rate prescribed in clause 5.1.1 of the Award for the ordinary hours worked each week during the period of Nick's employment between 5 September 2005 and 26 March 2006;
- (b) pay Nick at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of his employment between 27 March 2006 and 20 August 2006;

- (c) pay Nick overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of his employment.
  - (d) employ Nick for ordinary hours which did not exceed an average of 38 hours per week during the period of his employment as required by clause 6.1.1(b)(i) of the Award.
36. During the period of Nick's employment between 5 September 2005 and 20 August 2006, Aprint deducted the amounts identified in schedule "Nick 2" to the statement of claim, from Nick's weekly pay.
37. As a result Aprint failed to pay Nick by cash, cheque or electronic funds transfer as required by clause 5.3.3 of the Award.

**Jack**

38. Jack:
- (a) was employed in the Business during the period between 5 September 2005 and 20 August 2006 performing a range of duties including cutting paper and preparing ink for other machine operators, folding paper, packing and cleaning; and
  - (b) performed the duties of a Level 1 employee (for the purposes of clause 5.1.1 of the Award) during the first week of his employment; and
  - (c) for the remainder of his employment performed the duties of a Level 2 employee (for the purposes of clause 5.1.1 of the Award).
39. During his employment:
- (a) Jack's ordinary hours of work averaged 50 hours per week, alternatively in excess of 50 hours per week;
  - (b) Jack worked the hours identified in the column headed "Ordinary Hours" in each weekly table in Schedule "Jack 1" to the statement of claim;

- (c) Jack worked the additional hours identified in the column headed “Overtime” in each weekly table in Schedule “Jack 1” to the statement of claim;
- (d) Jack was paid the amounts identified next to the “Received” entry in each weekly table in Schedule “Jack 1” to the statement of claim;
- (e) Jack was entitled to receive the amounts identified in the column headed “Entitlement” in each weekly table in Schedule “Jack 1” to the statement of claim; and
- (f) Jack was underpaid the amounts identified next to the “U/P” entry in each weekly table in Schedule “Jack 1” to the statement of claim.

40. As a result, Aprint failed to:

- (a) pay Jack at the rate prescribed in clause 5.1.1 of the Award for the ordinary hours worked each week during the period of Jack’s employment between 5 September 2005 and 26 March 2006;
- (b) pay Jack at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of his employment between 27 March 2006 and 20 August 2006;
- (c) pay Jack overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of his employment;
- (d) employ Jack for ordinary hours which did not exceed an average of 38 hours per week during the period of his employment as required by clause 6.1.1(b)(i) of the Award.

41. During the period of Jack’s employment between 5 September 2005 and 20 August 2006, Aprint deducted the amounts identified in schedule “Jack 2” to the statement of claim, from Jack’s weekly pay.

42. As a result Aprint failed to pay Jack by cash, cheque or electronic funds transfer as required by clause 5.3.3 of the Award.

## **Frank**

43. Frank:
- (a) was employed in the Business during the period between 26 August 2006 and 8 September 2006 as a qualified Printer and independently operated a 74SM printing machine; and
  - (b) performed the duties of a Level 5 employee (for the purposes of clause 5.1.1 of the Award) during his employment.
44. During his employment:
- (a) Frank worked the hours identified in the column headed “Ordinary Hours” in each weekly table in Schedule “Frank 1” to the statement of claim;
  - (b) Frank worked the additional hours identified in the column headed “Overtime” in each weekly table in Schedule “Frank 1” to the statement of claim;
  - (c) Frank was paid the amounts identified next to the “Received” entry in each weekly table in Schedule “Frank 1” to the statement of claim;
  - (d) Frank was entitled to receive the amounts identified in the column headed “Entitlement” in each weekly table in Schedule “Frank 1” to the statement of claim; and
  - (e) Frank was underpaid the amounts identified next to the “U/P” entry in each weekly table in Schedule “Frank 1” to the statement of claim.
45. As a result, Aprint failed to:
- (a) pay Frank at the rate prescribed in clause 5.1.1 of the Award, alternatively the preserved APCS, for the ordinary hours worked each week during the period of his employment; and
  - (b) pay Frank overtime as prescribed in clauses 6.4.2 and 6.4.3 of the Award for the overtime worked each week during the period of his employment.

46. For the purposes of ss.728(1) and (2)(c) of the WR Act, from 27 March 2006, Mr. Tu was, by act or omission, directly or indirectly, knowingly concerned in the Aprint contraventions referred to **in paragraphs 2(b) to (e) above** because:

- (a) prior to the Employees commencing their employment with Aprint, he visited China and interviewed each of them concerning the positions available at Aprint;
- (b) on behalf of Aprint, he negotiated the terms and conditions upon which the Employees would be employed by Aprint;
- (c) on behalf of Aprint, he engaged a migration agent in Australia to ensure that each of the Employees obtained the relevant visa to allow them travel to Australia and work for Aprint and on behalf of Aprint, he made proper disclosure of the hours that were to be worked and the salary that would be paid;
- (d) he arranged accommodation for each of the Employees when they arrived in Australia to work for Aprint and for the majority of their employment with Aprint at premises owned by him or an entity associated with him;
- (e) he estimated that the figure of \$10,000 would be payable as a fair measure of the costs of assisting the Employees work in Australia on the basis that \$5000 of the total would be a bond repayable to the Employee on completion of his employment under the visa;
- (f) he determined that a further sum of about \$120.00 per week would be paid by each of the Employees to Aprint by deducting that amount from their weekly pay;
- (g) he told each of the Employees that the reason for that deduction was to pay for for “legal expenses” in connection with their migration to Australia and for the Mr. Tu’s “travelling expenses” while recruiting in China;
- (h) he determined to deduct other sums from time to time from the weekly pay of each of the Employees, telling them that the deductions were for other costs associated with the accommodation;

- (i) he determined the hours and times that each of the Employees worked during their employment with Aprint; and
- (j) he determined how much each of the Employees would be paid for the work that they performed during their employment with Aprint.

### **Total Underpayment**

47. Aprint underpaid the Employees in respect of their entitlements under the Award and AFPCS as follows:
- (a) in the case of Harry, \$30,946.47;
  - (b) in the case of Nick, \$31,706.96;
  - (c) in the case of Jack, \$30,225.03; and
  - (d) in the case of Frank, \$785.20,
- making a total of \$93,667.66.

### **Mitigating factors**

48. On 4 October 2006, the Applicant hand delivered a letter addressed to Mr Tu summarising the alleged breaches by Aprint of the Award and AFPCS.
49. On 13 October 2006, the Applicant received an undertaking from Mr. Tu in which he acknowledged that Aprint owed money to the Employees. Mr. Tu also undertook on behalf of Aprint to provide the OWS with cheques for outstanding payments to the Employees by Wednesday 18 October 2006.
50. On 18 October 2006, Aprint provided the Applicant with 10 cheques drawn in favour of the Employees in amounts representing the underpayment of wages to Harry, Nick, Jack and Frank.
51. The Applicant subsequently gave the cheques in person to Harry, Nick, Jack and Frank and has been told by each of the Employees that they have since banked the cheques and the cheques have cleared.

52. The Applicant acknowledges that Aprint and Mr. Tu have cooperated with the OWS and that the underpayments were promptly remedied.

DATED:

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**Blake Dawson Waldron**  
**Solicitors for the Applicant**

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**Charles Chow**  
**Solicitor for the Second Respondent**